

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BP WEST COAST PRODUCTS, LLC,
Plaintiff and Counter-Defendant,
v.
CROSSROAD PETROLEUM, INC., ET
AL.,
Defendants and Counter-Claimants.

Case No.: 12-CV-665 JLS (JLB) Lead Case

ORDER GRANTING IN PART AND DENYING IN PART MOTION FOR SUMMARY JUDGMENT

(ECF No. 685)

AND RELATED CONSOLIDATED ACTIONS

Presently before the Court is Plaintiff and Counter-Defendant BP West Coast Products (“BP”)'s Motion for Partial Summary Judgment on its Fuel Claims, (“MSJ,” ECF No. 685). In Response to the MSJ was filed a Declaration by Pamela G. Lacey in Support of Opposition to Motion to Dismiss and Motion for Summary Judgment, (“Lacey Decl.,” ECF No. 692). BP then filed a Reply, (“Reply,” ECF No. 697). BP's Motion for Summary Judgment requests the Court grant relief as to:

(1) BP's Third Claim for Relief in its Fifth Amended and Consolidated Complaint against Defendants Khaja Ansari, NP Petroleum Corp., Sharina Alloush, Daisie Enterprises, Inc., and Hadaf Inc. ("Dealer Defendants") for damages resulting from Breach of Franchise Agreements for the failure to pay for motor fuel;

(2) BP's Fifth Claim for Relief as to guarantor defendants Khaja Ansari, Fazilath Ansari, Nader Sahih, Payam Sahih, Rajesh Arora, Anup Patel, Tarun Maitra, and Soma Prasad ("Guarantor Defendants") for Breach of Franchise Guarantees for the failure to pay the amounts owed for motor fuel.¹

(MSJ 2; see “Fifth Am. Compl.” ECF No. 296-3.)

BACKGROUND

The Dealer Defendants operated gas stations under franchise agreements with BP on sites they leased from BP, and the Guarantor Defendants backed these lease and franchise agreements. (MSJ 2.) BP alleges it sold and delivered motor fuel to the Dealer Defendants for them to resell at their respective subleased stations. (*Id.*) BP alleges, pursuant to the terms of the Parties' contracts, the Dealer Defendants were required to pay BP for the fuel. BP alleges it delivered fuel to the Dealer Defendants, but these Defendants defaulted on payments for motor fuel. (*Id.*) BP also alleges the Guarantor Defendants failed to pay BP amounts owed for motor fuel, which they personally guaranteed, thus breaching their guaranty agreements. (*Id.* at 3.)

LEGAL STANDARD

Under Federal Rule of Civil Procedure 56(a), a party may move for summary judgment as to a claim or defense or part of a claim or defense. Summary judgment is

¹ After BP filed its Motion for Summary Judgment, the Court adopted Judge Burkhardt's Report and Recommendation recommending the Court issue terminating sanctions against five Defendants in this matter. (ECF No. 699.) As relevant here, the Court entered judgment against Defendants Rajesh Arora and Nader Sahih and dismissed with prejudice any counterclaims asserted by these Defendants. (*Id.*) Thus, the Court does not analyze BP's claims against these two Defendants here. For clarity's sake, the Court matches the two sets of the remaining Defendants addressed in the present MSJ as follows:
Khoie Ansari; guarantor for Khoie Ansari;

Khaja Ansari; guarantor for Khaja Ansari;
Fazilath Ansari; guarantor for Khaiz Ansari;

Fazilatil Ahsan: guarantor for Khaja Ahsan,
Payam Sahib: guarantor for NP Petroleum Corp.

Payam Samii: guarantor for NT Petroleum Corp.;
Anup Patel: guarantor for Daisie Enterprises Inc.

Tarun Maitra: guarantor for Hadaf, Inc.

Soma Prasad: guarantor for Hadaf, Inc.

(See Fifth Am. Compl. ¶¶ 38, 40, 58, 64.) Dealer Defendant Sharina Alloush does not appear to have a guarantor.

1 appropriate where the Court is satisfied that there is “no genuine dispute as to any material
2 fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a);
3 *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Material facts are those that may affect
4 the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A
5 genuine dispute of material fact exists only if “the evidence is such that a reasonable jury
6 could return a verdict for the nonmoving party.” *Id.* When the Court considers the
7 evidence presented by the parties, “[t]he evidence of the non-movant is to be believed, and
8 all justifiable inferences are to be drawn in his favor.” *Id.* at 255.

9 The initial burden of establishing the absence of a genuine issue of material fact falls
10 on the moving party. *Celotex*, 477 U.S. at 323. The moving party may meet this burden
11 by identifying the “portions of ‘the pleadings, depositions, answers to interrogatories, and
12 admissions on file, together with the affidavits, if any,’” that show an absence of dispute
13 regarding a material fact. *Id.* When a party seeks summary judgment as to an element for
14 which it bears the burden of proof, “it must come forward with evidence which would
15 entitle it to a directed verdict if the evidence went uncontested at trial.” *See C.A.R.*
16 *Transp. Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (quoting
17 *Houghton v. South*, 965 F.2d 1532, 1536 (9th Cir. 1992)).

18 Once the moving party satisfies this initial burden, the nonmoving party must
19 identify specific facts showing that there is a genuine dispute for trial. *Celotex*, 477 U.S.
20 at 324. This requires “more than simply show[ing] that there is some metaphysical doubt
21 as to the material facts.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574,
22 586 (1986). Rather, to survive summary judgment, the nonmoving party must “by her own
23 affidavits, or by the ‘depositions, answers to interrogatories, and admissions on file,’
24 designate ‘specific facts’” that would allow a reasonable fact finder to return a verdict for
25 the non-moving party. *Celotex*, 477 U.S. at 324; *Anderson*, 477 U.S. at 248. The non-

26

27

28

1 moving party cannot oppose a properly supported summary judgment motion by “rest[ing]
2 on mere allegations or denials of his pleadings.” *Anderson*, 477 U.S. at 256.²

3 ANALYSIS

4 BP alleges this issue is straightforward: the Dealer Defendants agreed to pay for the
5 motor fuel, they received the motor fuel, they were notified of their obligation to pay, but
6 neither they nor the Guarantor Defendants paid. In her Declaration, Ms. Lacey states that
7 at the mediation on October 18–19, 2016, it was made apparent that there are “differences
8 as to the amount of the verified claims being made between BP and Defendants Daisie and
9 Barbat.” (Lacey Decl. ¶ 4.) Ms. Lacey also declares BP is not cooperating with “good faith
10 and fair dealing implicit in every contract” because there were documents produced to
11 demonstrate BP’s figures may have been wrong as to defendants Daisie and Barbat. (*Id.* ¶
12 5.) Ms. Lacey also declares BP owes the Shomers Group close to \$75,000 so dismissal is
13 not proper. (*Id.*)³ Ms. Lacey also requests another mediation, and asserts that the
14 affirmative defenses of estoppel and unclean hands asserted in Defendants’ answer are
15 applicable here. (*Id.*)

16 BP is correct in its assertion that the Lacey Declaration does not address the majority
17 of the Dealer Defendants and Guarantor Defendants listed in BP’s Motion for Summary
18 Judgment. BP requests summary judgment be entered against five Defendants and eight
19 Guarantor Defendants, (MSJ 2), and, of these, the Lacey Declaration only discusses
20 Defendant Daisie. A court cannot grant a motion for summary judgment based on the

22 ² The Court applies California law to determine whether or not there is a triable issue of fact regarding
23 BP’s claims. *See In re Cochise Coll. Park*, 703 F.2d 1339, 1348 n.4 (9th Cir. 1983) (“[T]he question of
24 the legal consequences of one party’s failure to perform its remaining obligations under a contract is an
issue of state contract law.”).

25 ³ It appears Ms. Lacey’s declaration is addressing two separate motions filed by BP: first, BP’s Motion
26 for Voluntary Dismissal, (ECF No. 686), and second, BP’s Motion for Summary Judgment, (ECF No.
685). The Court ordered any response to BP’s Motion for Voluntary Dismissal to be filed on or before
October 23, 2017. (*See ECF No. 689.*) When no opposition to the motion was filed, the Court granted
the motion on October 25, 2017. (ECF No. 691.) Ms. Lacey filed her Declaration, opposing both motions,
on November 7, 2017. (ECF No. 692.) Therefore, this seems to explain why Ms. Lacey references
Defendants Barbat and the Shomers Group in her Declaration. Neither of these Defendants are mentioned
in BP’s MSJ, and the Court has granted BP’s motion to dismiss these Defendants. (*See ECF No. 691.*)

1 nonmoving party's failure to oppose the motion. A court may grant summary judgment
2 only where the moving party demonstrates that, in light of the undisputed facts in the
3 record, it is entitled to judgment as a matter of law. *Ahanchian v. Xenon Pictures, Inc.*,
4 624 F.3d 1253, 1258 (9th Cir. 2010) ('Ninth Circuit precedent bars district courts from
5 granting summary judgment simply because a party fails to file an opposition or violates a
6 local rule, and [district courts must] analyze the record to determine whether any disputed
7 material fact [i]s present."'). Thus, the Court analyzes BP's Motion on the merits.

8 **I. BP's Breach of Franchise Agreements Claim**

9 BP seeks summary judgment of its third claim for relief, Breach of Franchise
10 Agreements. (MSJ 2; *see also* Fifth Am. Compl.) To prevail on a claim for breach of
11 contract, BP must establish (1) the existence of a valid contract, (2) BP's performance or
12 excuse for nonperformance, (3) Defendants' breach, and (4) resulting damages. *See*
13 *Reichert v. Gen. Ins. Co.*, 442 P.2d 377, 381 (Cal. 1968).

14 **A. *The Contracts (i.e., Franchise Agreements)***

15 The first issue is whether there is a valid contract for the payment of motor fuel. To
16 establish the existence of a valid contract the plaintiff must allege: (1) parties capable of
17 contracting; (2) their consent; (3) a lawful object; and (4) sufficient cause or consideration.
18 *United States ex rel. Oliver v. Parsons Co.*, 195 F.3d 457, 462 (9th Cir. 1999) (citing Cal.
19 Civ. Code § 1550).

20 BP provided copies of all five of the Dealer Defendant's franchise agreement with
21 BP. (*See* ECF Nos. 685-46 to 685-50 (BP's Request for Admissions to the five Dealer
22 Defendants).)⁴ On each of these Request for Admissions, Request No. 1 asks the
23 Defendant to "[a]dmit that Exhibit A attached hereto is a true and correct copy of the
24 FRANCHISE AGREEMENT that YOU executed." Magistrate Judge Burkhardt deemed

25
26
27
28 ⁴ ECF No. 685-46 is BP's Request for Admissions to Khaja Ansari. ECF No. 685-47 is BP's Request for
Admissions to NP Petroleum Corp. ECF No. 685-48 is BP's Request for Admissions to Sharina Alloush.
ECF No. 685-49 is BP's Request for Admissions to Daisie Enterprises, Inc. ECF No. 685-60 is BP's
Request for Admissions to Hadaf Inc.

1 these Requests admitted by various Defendants as the Defendants' responses were
2 untimely and failed to satisfy Federal Rule of Civil Procedure 36. (*See* ECF No. 412; *see*
3 *also* ECF No. 414 (listing the defendants to which that ECF No. 412 applies). The five
4 Dealer Defendants appear on the ECF No. 414 list. Thus, the Dealer Defendants are
5 deemed to have admitted that they executed the franchise agreements attached to their
6 respective Requests for Admission. *See Conlon v. United States*, 474 F.3d 616, 621 (9th
7 Cir. 2007) ("Unanswered requests for admissions may be relied on as the basis for granting
8 summary judgment." (citing *O'Campo v. Hardisty*, 262 F.2d 621, 624 (9th Cir. 1958))).
9 Thus, the Court finds there is no dispute of material fact that the Dealer Defendants
10 consented to the contracts.⁵

11 Turning to the element of lawful object, a provision in each of the five franchise
12 agreements states: "Franchisee shall pay for ARCO Branded Motor Fuels sold and
13 delivered to Franchisee hereunder at the prices established for such Motor Fuels from time
14 to time by BPWCP." (*See, e.g.*, ECF No. 685-46 ¶ 3.e.) "Unless BPWCP extends credit
15 to Franchisee . . . Franchisee will pay for ARCO Branded Motor Fuels prior to its delivery
16 in U.S. dollars. BPWCP shall require a product advance payment approximately equal to
17 the current cost of an average delivery of Branded Motor Fuel." (*Id.* ¶ 3.f.) "Franchisee
18 agrees to accept and pay for such Branded Motor Fuels as are delivered to the Premises."
19 (*Id.* at ¶ 5.b.) The Court finds the Agreements involve a lawful object as they are contracts
20 for the franchise of fuel station and for motor fuel. Finally, the Court finds sufficient
21 consideration, as both parties benefitted from the franchise agreement; BP received money
22 and the Defendants received motor fuel. "A contract is supported by sufficient
23 consideration if there is some benefit to the promisor or detriment to the promisee."
24 *VasoNova Inc. v. Grunwald*, No. C 12-02422 WHA, 2012 WL 6161041, at *5 (N.D. Cal.
25 Dec. 11, 2012) (quoting *Sandrini v. Branch*, 32 Cal. App. 2d 707, 709 (Ct. App. 1939)).

26
27 ⁵ Further, as to the element of capability: "[a]ll persons are capable of contracting, except minors, persons
28 of unsound mind, and persons deprived of civil rights." Cal. Civ. Code § 1556. The Dealer Defendants
are franchise owners and there is no dispute of material fact they are capable of contracting.

1 In sum, there is no dispute of material fact as to the existence of a valid contract between
2 BP and the Dealer Defendants.

3 ***B. BP's Performance of Excuse of Non-Performance, and Defendants' Breach***

4 In its Statement of Facts, BP alleges it delivered motor fuel to each of the Dealer
5 Defendants' stations. For example, as to Defendant Ansari, BP alleges it delivered motor
6 fuel to Defendant Ansari on five occasions the week of April 19, 2012. ("SoF," ECF No.
7 685-2, ¶¶ 16–20.) BP alleges it then attempted to draw funds from Ansari's account, but
8 the fund transfers failed, and BP then put Ansari on COD (meaning any future motor fuel
9 payments by Ansari would need to be made at the time of delivery). (SoF ¶¶ 15, 22.) BP
10 alleges similar situations for the other four Defendants; BP alleges it delivered fuel to the
11 Defendant's site(s), attempted to draw funds from the Defendant's account, the fund
12 transfer(s) failed, and BP placed the Defendant on COD. (SoF ¶¶ 25–30 (NP Petroleum);
13 ¶¶ 31–46 (Alloush); ¶¶ 47–51 (Daisie); ¶¶ 52–54 (Hadaf).)⁶

14 As noted above, the Dealer Defendants have not opposed BP's allegations that they
15 entered into a franchise agreement, BP performed by delivering fuel, and the Dealer
16 Defendants' failed to pay for the fuel. (*See generally* Lacey Decl. (not addressing the
17 Parties' performance or actions).) A court may "grant an unopposed motion for summary
18 judgment if the movant's papers are themselves sufficient to support their motion and do
19 not on their face reveal a genuine issue of material fact." *Van Mathis v. Safeway Grocery*,
20 No. C 09-2026 WHA (PR), 2010 WL 3636213, at *1 (N.D. Cal. Sept. 14, 2010) (citing
21 *Carmen v. S.F. Unified Sch. Dist.*, 237 F.3d 1026, 2029 (9th Cir. 2001)).

22 Here, the Court finds BP's papers sufficient on their face to support a finding of BP's
23 performance and the Dealer Defendants' breach. BP has submitted evidence of bills of
24 landing (confirming delivery) and corresponding invoices for each fuel delivery to each of
25 the Dealer Defendants. (ECF Nos. 685-4 to 685-13 (Ansari); ECF Nos. 685-15, 685-16,

27 ⁶ BP's allegations as to Defendant Hadaf differ slightly: Hadaf was placed on COD payment terms in early
28 2012, but BP delivered fuel to Hadaf in May 2012 "for purposes of testing the fuel tanks" and alleges it
has not been paid to date. (SoF ¶ 52–54.)

1 685-19, & 685-20 (NP Petroleum); ECF Nos. 685-24 to 685-36 (Alloush); ECF Nos. 685-
2 38, 685-39 (Daisie); ECF Nos. 685-43, 685-44 (Hadaf.) These bills and invoices were
3 authenticated by BP’s Financial Analyst, Allison Swinson, who was previously BP’s
4 Credit & Retail Manager. (*See generally* “Swinson Decl.”, ECF No. 685-3.) Ms. Swinson
5 has also declared none of the five Dealer Defendants have paid BP for the fuel delivery.
6 (*Id.* ¶¶ 25, 34, 43, 59, 62, 67.) There is no controverting evidence. The Court finds these
7 elements are met.

C. Resulting Damages to BP

BP alleges it has not been paid a total of \$166,971.81 for motor fuel delivered to Defendant Ansari, (SoF ¶ 24), a total of \$71,574.81 for motor fuel delivered to Defendant NP Petroleum, (SoF ¶ 30), a total of \$136,562.23 for motor fuel delivered to Defendant Alloush, (SoF ¶ 46), a total of \$35,261.96 for motor fuel delivered to Defendant Daisie, (SoF ¶ 51), and a total of \$34,398.71 for motor fuel delivered to Defendant Hadaf. (SoF ¶ 24). But BP also notes these Defendants have credits and deposits “that BPWCP will offset against any judgment in its favor.” (MSJ 7 n.2.)

Under the franchise agreement, “[u]nless BPWCP extends credit to Franchisee as provided below, Franchisee will pay for ARCO Branded Motor Fuels prior to its delivery in U.S. dollars.” (See, e.g., ECF No. 685-46, ¶3.e.) BP has alleged all five Dealer Defendants owe BP for motor fuel, subject to credits. As to Defendants Ansari, NP Petroleum, Alloush, and Hadaf, there is no evidence controverting BP’s evidence of damages. BP has produced evidence in the form of invoices authenticated by BP’s Financial Analyst, detailing its damages. Thus, the Court finds BP has proven the element of damages as to these four Dealer Defendants.

24 As to Defendant Daisie, Ms. Lacey does contest BP's damages amount in her
25 declaration. She alleges “[w]ithout breaching the confidentiality of the proceedings,
26 suffice it to say that documents were produced to demonstrate BP's figures may have been
27 wrong” and their records represent “a \$35,000 difference to Daisie Enterprises, which BP

1 paid off in August 2012, yet now seeks that amount from Daisie.” (Lacey Decl. ¶ 5.)⁷ This
2 assertion is unclear. It also appears to contend that Ms. Lacey is in possession of evidence
3 that contradict BP’s damages figures—but these documents are not attached to the
4 declaration nor specifically referred to. When considering a motion for summary
5 judgment, a court may not weigh the evidence nor assess credibility; instead, “the evidence
6 of the non-movant is to be believed, and all justifiable inferences are to be drawn in his
7 favor.” *Anderson*, 477 U.S. at 255. But, “[t]he district court may limit its review to the
8 documents submitted for the purpose of summary judgment and those parts of the record
9 specifically referenced therein.” *Carmen*, 237 F.3d at 1030. Therefore, the Court is not
10 obligated “to scour the record in search of a genuine issue of triable fact.” *Keenan v. Allen*,
11 91 F.3d 1275, 1279 (9th Cir. 1996) (internal citation omitted).

12 It seems that Ms. Lacey is indeed asking the Court to “scour the record” searching
13 for documents that will contradict BP’s damages figure as to Defendant Daisie. Vaguely
14 referring to “documents produced” in this matter (a case that has been accruing documents
15 since 2012), without more, is insufficient to show a genuine issue of material fact. As here,
16 where the moving party, BP, has shown an absence of a genuine issue of material fact, a
17

18 ⁷ To the extent Ms. Lacey’s declaration is couched as a request for the Court to defer consideration of the
19 MSJ under Rule 56(d), the Court evaluates it as such. “If a nonmovant shows by affidavit or declaration
20 that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) defer
21 considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery;
22 or (3) issue any other appropriate order.” Fed. R. Civ. P. 56(d). And “[a]lthough [Rule 56(d)] facially
23 gives judges the discretion to disallow discovery when the non-moving party cannot yet submit evidence
24 supporting its opposition, the Supreme Court has restated the rule as requiring, rather than merely
25 permitting, discovery ‘where the nonmoving party has not had the opportunity to discover information
26 that is essential to its opposition.’” *Metabolife Int’l, Inc. v. Wornick*, 264 F.3d 832, 846 (9th Cir. 2001)
27 (quoting *Anderson*, 477 U.S. at 250 n.5). Here, it does not appear Ms. Lacey is stating that discovery
28 would better allow the Defendants to file a response to the MSJ. Instead, she states documents were
produced and BP has not responded to the documents or “negotiated further.” (Lacey Decl. ¶ 5.) There
is no indication Defendants have not had an adequate opportunity to discover information or collect
evidence, nor that there is any discovery that exists that would preclude summary judgment. Thus, the
Court does not defer its ruling on this MSJ pursuant to Rule 56(d). See *Getz v. Boeing Co.*, 654 F.3d 852,
867–68 (9th Cir. 2011) (explaining that a plaintiff must show that the discovery sought would have
precluded summary judgment in order to be granted additional discovery).

1 nonmoving party cannot defeat summary judgment merely by demonstrating “that there is
2 some metaphysical doubt as to the material facts.” *Matsushita Elec. Indus.*, 475 U.S. at
3 586. Therefore, the Court finds BP has met this element as to Defendant Daisie’s damages;
4 Ms. Lacey’s unclear declaration referring to the existence some document does not show
5 an issue of material fact.

6 **D. Conclusion**

7 In sum, there is no dispute of material fact that BP and the Dealer Defendants entered
8 into a contract, BP performed, the Dealer Defendants failed to perform, and BP was
9 damaged as a result. Thus, the Court **GRANTS** BP’s Third Claim for Relief in its Fifth
10 Amended and Consolidated Complaint against the Dealer Defendants: Khaja Ansari, NP
11 Petroleum Corp., Sharina Alloush, Daisie Enterprises, Inc., and Hadaf Inc., for damages
12 resulting from breach of franchise agreements for the failure to pay for motor fuel.

13 **II. BP’s Breach of Franchise Guaranties Claim**

14 BP seeks summary judgment of its fifth claim for relief, Breach of Franchise
15 Guaranties. (MSJ 2; *see also* Fifth Am. Compl.)

16 “A guarantor makes a direct promise to perform the principal’s obligation in the
17 event the principal fails to perform.” *United States ex rel. Hajoca Corp. v. Aeroplate Corp.*,
18 No. 12-cv-1287-AWI-BAM, 2013 WL 3729692, at *5 (E.D. Cal. July 12, 2013). To meet
19 its burden on this Motion for Summary Judgment, BP must show the following: “1) there
20 is a valid guaranty, 2) the borrower has defaulted, and 3) the guarantor failed to perform
21 under the guaranty.” *Grayl CPB, LLC v. Kolokotronis*, 202 Cal. App. 4th 480, 486 (Ct.
22 App. 2011) (citing *Torrey Pines Bank v. Superior Court*, 216 Cal. App. 3d 813, 819 (Ct.
23 App. 1989)).

24 **A. Valid Guaranty**

25 The first issue is the existence of a valid guaranty for each of the Guaranty
26 Defendants. To assist in the determination of the validity of these agreements, the Court
27 requested supplemental briefing from the Parties because neither Party addressed the issue
28

1 in their summary judgment briefs. Both Parties filed supplemental briefs on the issue. (*See*
2 “BP Supp. Brief,” ECF No. 700; “Def. Supp. Brief,” ECF No. 701.)⁸

3 As was the case with the Dealer Defendants, BP submitted a Request for Admission
4 to each Guaranty Defendant requesting they admit the attached documents are “true and
5 correct copies of the FRANCHISE GUARANTIES that YOU executed in favor of BPWCP
6 with regard to the FRANCHISE AGREEMENT.” (*See, e.g.*, ECF No. 685-53, at 4 (RFA
7 for Defendant Payam Sahih). Magistrate Judge Burkhardt deemed these Requests admitted
8 as the responses were untimely and failed to satisfy Federal Rule of Civil Procedure 36.
9 (*See* ECF No. 412; *see also* ECF No. 414 (listing the defendants to which that ECF No.
10 412 applies).) The eight Guaranty Defendants appear on the ECF No. 414 list.

11 Thus, the Guaranty Defendants are deemed to have admitted that they executed the
12 guaranty agreement attached to their respective Request for Admission. *See Conlon*, 474
13 F.3d at 621 (“Unanswered requests for admissions may be relied on as the basis for granting
14 summary judgment.” (citing *O’Campo*, 262 F.2d at 624)). But, the Court must also assess
15 the validity of these agreements.

16 *1. Legal Standard*

17 A guaranty obligation must be in writing and signed by the guarantor. Cal. Civ. Code
18 § 2793. Generally, a valid contract requires mutual consent of the parties and
19 consideration. *See* Cal. Civ. Code §§ 1550, 1565. For purposes of the guaranty,
20 “consideration for a contract is equally valuable whether it move[s] to the other party or a
21 third party. Consideration does not have to move to the promisor.” *City of Los Angeles v.*
22 *Anchor Cas. Co.*, 204 Cal. App. 2d 175, 181–82 (Ct. App. 1962) (citations omitted).
23 “Where a suretyship obligation is entered into at the same time with the original obligation,
24 or with the acceptance of the latter by the creditor, and forms with that obligation a part of

25
26
27
28 ⁸ Defendants’ supplemental brief discusses issues beyond what was requested. (*See* Def. Supp. Brief 4–6
(discussing issues as to the Dealer Defendants).) Out of fairness to both Parties, the Court only considers
the arguments on the specific issue requested.

1 the consideration to him, no other consideration need exist. In all other cases there must
2 be a consideration distinct from that of the original obligation.” Cal. Civ. Code § 2792.

3 2. *The Sham Guaranty Defense*

4 In their supplemental briefing, Defendants argue the guaranties are “sham
5 guaranties” and thus illusory. (Def. Supp. Brief 2.) Under California law, “[a] surety or
6 guarantor is one who promises to answer for the debt, default, or miscarriage of another,
7 or hypothecates property as security therefor.” Cal. Civ. Code § 2787 (emphasis added).
8 Therefore, “to collect a deficiency from a guarantor, he must be a true guarantor and not
9 merely the principal debtor under a different name.” *Cadle Co II v. Harvey*, 83 Cal. App.
10 4th 927, 932 (Ct. App. 2000). “It is well established that where a principal obligor purports
11 to take on additional liability as a guarantor, nothing is added to the primary obligation.”
12 *Torrey Pines*, 231 Cal. App. 3d at 319–20. If this is the case, the guaranty must be
13 considered ineffective. *Id.* at 320; *see also Asmus v. Pac. Bell*, 23 Cal.4th 1, 32 (Ct. App.
14 2000) (“Doing or promising to do what one already is legally bound to do cannot be
15 consideration for a promise.”). “It is a factual question whether a person is a true guarantor
16 or a principal obligor in guarantor’s guise.” *River Bank Am. v. Diller*, 38 Cal. App. 4th
17 1400, 1422 (Ct. App. 1995).

18 In determining whether a guaranty is a sham, the court must examine whether the
19 guarantor is actually the principal obligor, which occurs when “(1) the guarantor personally
20 executes underlying loan agreements or a deed of trust or (2) the guarantor is, in reality,
21 the principal obligor under a different name by operation of trust or corporate law or some
22 other applicable legal principle.” *CADC/RAD Venture 2011-1 LLC v. Bradley*, 235 Cal.
23 App. 4th 775, 786–87 (Ct. App. 2015). When there is “adequate legal separation between
24 the borrower and the guarantor, e.g., through the appropriate use of the corporate form,”
25 the sham guaranty defense generally will not apply. *Id.* at 787.

26 a. Guarantor Defendant Khaja Ansari

27 In its Fifth Amended Complaint, BP claims both Khaja Ansari and Fazilath Ansari
28 “executed a Franchise Agreement Guaranty thereby personally guaranteeing the

1 obligations with respect to Khaja Ansari’s Franchise Agreement with BPWCP.” (Fifth
2 Am. Compl. ¶ 38.) ECF No. 685-46 (Ex. E, 57–62) is an “Unconditional Guaranty”
3 executed by Defendant Khaja Ansari, guarantying the debt of himself. (*See also* ECF No.
4 685-46 (Ex. A, 8–43) (the franchise agreement executed by Defendant Khaja Ansari).) BP
5 has provided no information as to why the guaranty executed by Khaja Ansari is effective,
6 despite the fact that Defendant Khaja Ansari is guaranteeing his own franchise agreement.
7 Thus, BP has not shown an absence of material fact as to the validity of this guaranty
8 agreement. The Court **DENIES** BP’s claim for relief as Guarantor Defendant Khaja
9 Ansari.

b. Guarantor Defendant Tarun Maitra

11 Both Soma Prasad and Tarun Maitra executed agreements guaranteeing the debt of
12 Hadaf Inc. On Defendant Prasad's guaranty agreement, he agreed to "advance credit to
13 Hadaf Inc. (Tarun Maitra) (hereinafter cited 'Debtor')." (ECF No. 700-9.) On Defendant
14 Maitra's guaranty agreement, the debtor is listed as "Hadaf Inc." without reference to
15 himself as the debtor. (ECF No. 700-8.)

BP has not addressed the issue of whether there is adequate legal separation between guarantor Tarun Maitra and debtor Hadaf Inc. or whether Defendant Maitra's guaranty is a sham. "That the names 'on the dotted line' are different on the promissory note and trust deed, on the one hand, and on the guarantee agreement, on the other hand, is not enough to qualify" the guaranty as valid since "the supposed guarantors against whom suit has been brought [could be] nothing more than principal obligors under another name." *River Bank Am.*, 38 Cal. App. 4th at 1420 (internal citations and quotation marks omitted). Given the evidence before the Court, the Court finds there is a question of fact as to whether Tarun Maitra is Hadaf Inc. under another name. The Court therefore **DENIES** BP's claim for relief as to Guarantor Defendant Tarun Maitra.

3. The Other Guarantor Defendants

In its supplemental brief, BP provided that a guarantee is valid “where its terms are unambiguous, it is in writing, and it is signed by the guarantor.” (*Id.* at 2 (citing *Indymac*

1 *Bank, F.S.B v. Aryana/Olive Grove Land Develop., LLC*, No. 12-01494 VAP (DTBx), 2013
2 WL 12129624, at *6 (C.D. Cal. Sept. 4, 2013). Yet the court in *Indymac* goes on to note a
3 contract is valid if there is consideration, stating when a guaranty is made coincidentally
4 with the promissory note, the guaranty is supported by the same consideration as the note
5 and is enforceable. 2013 WL 12129624, at *6 (citing *Rancho Santa Fe Pharm. Inc. v.*
6 *Seyfert*, 219 Cal. App. 3d 875, 878 (Ct. App. 1990). For some reason, BP does not address
7 the issue of consideration in its supplemental brief. The Court there analyzes the guaranties
8 with the information provided.

9 These guaranties were signed by the Guarantor Defendants, in writing, and
10 contained clear terms.⁹ The issue is whether each guaranty is supported by consideration.
11 Because the date the agreements are entered into is important in this analysis, the Court
12 compiled the following chart for the remaining Guarantor Defendants:

Franchisee	Date Agreement Executed	ECF No.	Guarantor	Date Guaranty Executed	ECF Nos.
Khaja Ansari	12-30-08; 12-19-08; 10-22-10 ¹⁰	685-46	Fazilath Ansari	3-31-06	685-51; 700-3
NP Petroleum Corp	6-15-10	685-47	Payam Sahih	10-12-08; 6-7-10	685-53; 700-5
Daisie Enterprises, Inc.	5-31-11; 5-24-11	685-49	Anup Patel	5-26-11	685-55; 700-7
Hadaf, Inc.	11-12-08; 11-3-08	685-50	Soma Prasad	12-20-07	584-57; 700-9

21 As to Fazilath Ansari, it is unclear why Fazilath Ansari would execute a guaranty in
22 2006 when the debtor, Khaja Ansari, did not execute his agreement until 2008 at the

23
24
25 ⁹ In their supplemental brief, Defendants argue the language in the agreements is “overbroad and uncertain.”
26 (Def. Supp. Brief 3.) The Court disagrees, as a reading of the agreements discloses that they are neither
27 vague nor uncertain.

28 ¹⁰ It is unclear why there are signatures on dates almost two years apart; perhaps the second document was
29 a supplement, but both documents are included as “Exhibit A” to the Request for Admission, requesting
30 “Admit that Exhibit A attached hereto is a true and correct copy of the FRANCHISE AGREEMENT that
31 YOU executed.” But this variation is not important to the Court’s analysis below.

1 earliest. BP has provided no information as to this time discrepancy. BP also has provided
2 no information as to why consideration is sufficient; thus, BP has not met its burden of
3 showing a genuine issue of material fact. The Court finds BP has not met its burden of
4 proving the validity of Fazilath Ansari's guaranty agreement. The Court **DENIES** BP's
5 Motion for Summary Judgment on its Fifth Claim for Relief against Defendant Fazilath
6 Ansari.

7 As to Payam Sahih, the first guaranty agreement for this Defendant that BP produced
8 to the Court was signed in 2008, almost two years before the debtor's agreement. BP then
9 produced a second guaranty agreement signed in 2010, without explanation as to the date
10 change. (ECF No. 700-5). Because this guaranty agreement was executed at around the
11 same time as the debtor agreement, the Court finds consideration is sufficient. The same
12 result inures for Anup Patel, who signed the guaranty agreement coincidentally with his
13 respective debtor. The Court finds consideration is sufficient as to both of these
14 Defendants.

15 As to Soma Prasad, it is unclear why Defendant Prasad executed the guaranty almost
16 a year before her respective debtor executed its franchise agreement. Again, BP has
17 provided no information as to this discrepancy and therefore has not met its burden of
18 showing no genuine issue of material fact as to the validity of this agreement. The Court
19 **DENIES** BP's Motion for Summary Judgment on its Fifth Claim for Relief against
20 Defendant Soma Prasad.

21 Accordingly, the Court finds BP has met its initial burden as to this element of the
22 breach of guaranty claim for Guarantor Defendants Payam Sahih and Anup Patel. These
23 Guaranty Defendants have produced no evidence that calls the validity of the guarantees
24 into question.

25 ***B. Borrower Default***

26 BP alleges the debt owed to BP by the Dealer Defendants for motor fuel remains
27 outstanding. (MSJ 6; *see supra* Sections I.B & C.) As noted above, there is no genuine
28 issue of material fact that the Dealer Defendants were required to pay for the motor fuel

1 and have not done so. Thus, the Court has already found the Dealer Defendants defaulted.
2 The Court finds there is no material dispute of fact regarding this element.

3 **C. Guarantor Failure to Perform**

4 BP alleges the Guarantor Defendants failed to pay the respective amounts owed for
5 motor fuel. (MSJ 8.) Each guaranty required the guarantor to pay the amount owed by the
6 debtor. (*See e.g.*, ECF No. 685-52, at 7 (Unconditional Guaranty: “The undersigned . . .
7 hereby irrevocably, fully and unconditionally guarantees to BP the full and prompt
8 performance and payment when due, whether by acceleration or otherwise, of any and all
9 of the obligations of Debtor owed to BP . . .”); ECF No. 685-51, at 7 (Guarantee Agreement
10 Individual: “The undersigned . . . [advances] credit to [Debtor] and . . . [agrees] to any
11 additional credit at any time hereafter to Debtor for petroleum products and other
12 merchandise, or . . . to extend credit, advance money . . . of any money due or to become
13 due under contract or obligation arising from any lease or loan . . .”)).

14 The Court has already found there is no material dispute of fact that the Dealer
15 Defendants have failed to pay money due under their contracts. The Court finds BP’s
16 papers are sufficient to show the Guarantor Defendants have agreed to pay the Dealer
17 Defendants’ outstanding balance and that the Guarantor Defendants have not paid.
18 Defendants have produced no controverting evidence showing the Guaranty Defendants
19 have paid. Thus, the Court finds there is no material dispute of fact as to this element.

20 **D. Conclusion**

21 In sum, there is no dispute of material fact that BP and Guarantor Defendants Payam
22 Sahih and Anup Patel entered into valid guaranty agreements, the borrower defaulted, and
23 these Guaranty Defendants failed to perform.¹¹ Thus, the Court **GRANTS** BP’s Fifth

24
25 ¹¹ Other district courts in this state have analyzed a fourth element to a breach of guaranty claim—
26 notification of default. In *Indymac Bank*, the court noted:

27 In *Torrey Pines Bank v. Superior Court*, the California Court of Appeal identified an
28 additional element to a breach of guaranty claim not referenced in the *Grayl CPB, LLC*
case, *i.e.*, “the lender notified the defendant of the default.” 216 Cal. App. 3d at 819. The
Grayl CPB, LLC decision is a Court of Appeal decision as is *Torrey Pines Bank*; the *Grayl*

1 Claim for Relief in its Fifth Amended and Consolidated Complaint against Payam Sahih
2 and Anup Patel. The Court **DENIES** BP's Fifth Claim for Relief against Khaja Ansari,
3 Fazilath Ansari, Tarun Maitra, and Soma Prasad.

4 **III. Failure to File an Answer to Fifth Amended Complaint**

5 BP argues that because certain Defendants have failed to file an answer to BP's Fifth
6 Amended and Consolidated Complaint, BP's claims should be deemed admitted. (MSJ 9.)
7 BP's Complaint was deemed filed on May 2, 2014. (See ECF No. 300.) Notably, Khaja
8 Ansari, NP Petroleum, Sharina Alloush, Daisie Enterprises, and Hadaf Inc. have failed to
9 file an Answer. (See ECF Nos. 302–05, 309-1 (answers filed by various other Defendants).)

10 A defendant must serve an answer within 21 days after being served with the
11 summons and complaint an allegation “is admitted if a responsible pleading is required and
12 the allegation is not denied.” Fed. R. Civ. P. 8(b)(6); *see also Lockwood v. Wolf Corp.*,
13 629 F.2d 603, 611 (9th Cir. 1980) (finding the defendant’s failure to deny an allegation in
14 its answer to the plaintiff’s complaint constituted an admission and, as a result, no evidence
15 on this element of the bankruptcy case was required).

16
17
18 *CPB, LLC* decision does not overrule nor call into question the recitation in the *Torrey*
19 *Pines Bank* decision of four elements to a breach of guaranty claim under California law.

20 Accordingly, the Court will consider the additional element announced in *Torrey Pines*
Bank when evaluating Plaintiff[’s] breach of guaranty claim.

21 2013 WL 12129624, at *6 n.7; *see also Allied Irish Banks, P.L.C. v. R2D2, L.L.C.*, No. CV 08-8527
22 RSWL (FMOx), 2009 WL 10671184, at *3 (C.D. Cal. Mar. 11, 2009) (citing *Torrey Pines* to list the
23 elements of a breach of guaranty, including notification of default). Under California Civil Code section
24 2807, “[a] surety who has assumed liability for payment or performance is liable to the creditor
immediately upon the default of the principal, and without demand or notice.” *See also* Croskey et al.,
25 Cal. Practice Guide: Insurance Litigation (The Rutter Group 2017) ¶ 6:3436 (“[I]f the bond is silent, the
obligee is not required to give the surety notice of the principal’s default or make demand upon the surety
for payment.”).

26 There are two forms of guaranties in this matter. The Unconditional Guarantees specifically include
27 a waiver of notice of non-performance or nonpayment. (*See, e.g.*, ECF No. 685-52, at 7.) The guarantees
titled “Guarantee Agreement Individual” are silent as to notice. (*See, e.g.* ECF No. 685-51, at 7.) Therefore,
28 the Court finds it need not evaluate this element of “notification” in its summary judgment analysis.

Given the Court's above conclusions granting the majority of BP's Motion for Summary Judgment, the Court need not address this issue regarding deemed admissions as to the majority of the Defendants. The only portion of BP's Motion that the Court denies in this Order relates to the validity of the guaranty agreements by Defendants Khaja Ansari, Fazilath Ansari, Tarun Maitra, and Soma Prasad. Although Defendant Khaja Ansari did not file an answer, the Fifth Amended Complaint does not assert that Khaja Ansari entered into a valid guaranty agreement, which is the issue here. (See Fifth Am. Compl. ¶ 38 (alleging Khaja Ansari executed a guaranty thereby personally guaranteeing the obligations of Khaja Ansari's franchise agreement).) Even if the Court were to evaluate whether Defendant Ansari admitted the allegations against him, this would have no bearing on the issue presented in BP's Motion. Therefore, the Court need not evaluate whether BP's claims are deemed admitted here. Thus, the Court **DENIES AS MOOT** this portion of BP's Motion for Summary Judgment.¹²

CONCLUSION

The Court **GRANTS** BP's Motion for Summary Judgment as to BP's Third Claim for Relief in its Fifth Amended and Consolidated Complaint against Defendants Khaja Ansari, NP Petroleum Corp., Sharina Alloush, Daisie Enterprises, Inc., and Hadaf Inc. for damages resulting from breach of franchise agreements for the failure to pay for motor fuel. The Court **GRANTS** BP's Motion for Summary Judgment as to BP's Fifth Claim for Relief as to Guarantor Defendants Payam Sahih and Anup Patel for breach of franchise

¹² Ms. Lacey also declares “[a]ffirmative defenses were raised by Defendants' Answer to the Complaint, including estoppel and unclean hands theories, which are clearly applicable here.” (Lacey Decl. ¶ 5.) These affirmative defenses was pled by some Defendants, (see ECF No. 303, at ¶¶ 180, 183), but affirmative defenses without any explanation or supporting facts do not create a genuine issue of material fact. *See British Airways Bd. v. Boeing Co.*, 585 F.2d 946, 952 (9th Cir. 1978) (“[L]egal memoranda and oral argument are not evidence, and they cannot themselves create a factual dispute sufficient to defeat summary judgment.”); *La Reunion Francaise, S.A. v. Barran*, No. CV 96-8533 DT (VAPX), 1998 WL 776685, at *3 n.2 (C.D. Cal. May 11, 1998) (“If affirmative defenses always required trial, defendants could always defeat summary judgment by simply pleading an affirmative defense.”). Similarly, Ms. Lacey's argument that BP is not cooperating with “good faith and fair dealing implicit in every contract” does not create an issue of material fact as to the Defendants' breach of the contracts.

1 guarantees for the failure to pay the amounts owed for motor fuel. The Court **DENIES**
2 BP's Motion for Summary Judgment as to BP's Fifth Claim for Relief as to Guarantor
3 Defendant Khaja Ansari and Soma Prasad. The Court enters judgment as follows.

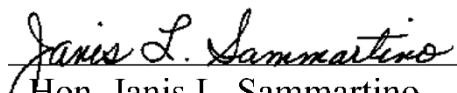
4 **I. Judgment**

5 "Under California law, the liability on a promissory note . . . is joint and several on
6 the part of the principal and the guarantor; the plaintiff is not entitled to a double recovery."
7 *Ascendant Cap. Grp. v. Smith*, 403 Fed. App'x 256, 257 (9th Cir. 2010) (citing Cal. Civ.
8 Code § 2807). As noted above, the Court has already entered judgment against Defendants
9 Nader Sahih and Rajesh Arora, (ECF No. 699). Because these Defendants are jointly and
10 severally liable with other Defendants as relevant to this Motion, the Court includes them
11 here. The Court enters judgment as follows. These judgments **SHALL** be offset by any
12 credits to which the Defendants are legally entitled. (*See* MSJ 7 n.2.)

- 13 1. Khaja Ansari is liable in the amount of \$166,971.81;
- 14 2. NP Petroleum Corp., Nader Sahih, and Payam Sahih are jointly and severally liable
15 in the amount of \$71,574.81;
- 16 3. Sharina Alloush is liable in the amount of \$205,288.88;
- 17 4. Daisie Enterprises Inc., Rajesh Arora, and Anup Patel are jointly and severally liable
18 in the amount of \$34,398.71;
- 19 5. Hadaf, Inc. is liable in the amount of \$34,398.71.

20 **IT IS SO ORDERED.**

21 Dated: January 2, 2018


22 Hon. Janis L. Sammartino
23 United States District Judge

24
25
26
27
28